No. 82-1616

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

WEBER AIRCRAFT CORPORATION, *et al.*,

Respondents.

BRIEF FOR THE RESPONDENT

LAWRENCE J. GALARDI,
DEAN F. COCHRAN,
20600 Eagle Pass Drive,
Malibu, Calif. 90265,
(213) 456-6688,
Attorneys for Respondent,
Mills Manufacturing Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether the United States Air Force has authority under Exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)), to withhold factual witness statements made to an Air Force Safety Investigation Board?

Parties to the Proceedings.

The United States of America is the Petitioner. Respondents are Weber Aircraft Corporation and Mills Manufacturing Corporation.

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BRIEF FOR THE RESPONDENT.

Opinions Below and Jurisdiction.

Respondent Mills concurs in the portions of Petitioner's Brief entitled "Opinions Below" and "Jurisdiction".

Statute and Regulations Involved.

Respondent concurs in the portion of Petitioner's Brief entitled "Statute and Regulations Involved", except that, with reference to Paragraph 3 thereof, Respondent Mills observes that Air Force Regulation 127-4 (Jan. 18, 1980), and Air Force Regulation 110-14 (July 18, 1977), were not in force in 1973, when the Air Force conducted its investigation of the accident which gave rise to this case.

Statement.

As mentioned in the briefs of this Respondent and Respondent Weber Aircraft Corporation in opposition to the Petition for Certiorari, there is substantial reason to believe

(*i*) that the true cause of Captain Hoover's injuries was error on the part of Air Force personnel in rigging, modifying, and maintaining Captain Hoover's parachute equipment; (*ii*) that such error has been disclosed in the factual statements made to the Air Force Safety Investigation Board which are sought in the instant case; and (*iii*) that such error was deliberately suppressed in the non-confidential statements to the Air Force Collateral Investigation Board which have been furnished to Respondents.

In addition to being a matter of vital importance to Respondents' defense in the underlying litigation, it must be noted that if there was *Air Force personnel error*, there is reason to believe that the error occurred because of deficient Air Force policies and procedures concerning personnel training and the assignment of personnel to tasks for which they are not adequately qualified.

Specifically, if, as we believe was the case, Captain Hoover's injuries were caused by aulty performance on the part of the Air Force rigger who last worked on Captain Hoover's parachute equipment, the proceedings before the Collateral Investigation Board together with deposition testimony in the underlying litigation, have elicited facts indicating that the rigger was a high school drop-out whose reading capabilities were below normal; that the tasks which he was assigned to perform on Captain Hoover's equipment may have required reading and other skills greater than he possessed; and that, through shortcomings in the applicable Air Force programs and procedures for training and assigning such personnel, he was passed through the pertinent Air Force training courses without having learned what he should have learned, and was then assigned to duties whose complexities exceeded his capabilities.

Considering the highly complex equipment with which Air Force personnel must routinely deal, and considering

the potentially devastating consequences if there are shortcomings in Air Force programs and procedures for training and assigning personnel to work with such equipment, the foregoing facts are clearly within a category of factual information that is of vital interest to the public at large, and to appropriate committees of Congress, the Chief Executive, the Secretary of Defense, and "watchdog" entities such as the General Accounting Office.

The question here is whether there is any support for Petitioner's assertion that Congress intended the Air Force to have such a privilege to conceal factual information when Congress enacted Exemption 5 of the Freedom of Information Act (5 U.S.C. 552(b)(5)).

In view of the foregoing, it is materially inaccurate to suggest the issue raised by Respondents in this case has no greater significance than that of an instance of private parties seeking to use the Freedom of Information Act as a substitute for civil discovery in private litigation, and that the privilege claimed by Petitioner is fully consistent with the goals of the Freedom of Information Act.

SUMMARY OF ARGUMENT.

Exemption 5 of the Freedom of Information Act does not exempt the material at issue here from disclosure either:

A. As matter privileged in the context of civil discovery; or

B. Because of the asserted promise of confidentiality; and,

C. the exercise in judicial legislation urged by Petitioner should not be indulged, leaving for the Congress the responsibility of providing such remedial legislation as the Air Force may demonstrate it needs.

A. As to Non-Disclosure for Reasons of Privilege in the Civil Discovery Context.[1]

Petitioner is clearly incorrect in its assertions that the language of Exemption 5 of the Freedom of Information Act is plain and unambiguous. To begin with, as noted by Mr. Justice White in his opinion in *EPA v. Mink*, 410 U.S. 73, at pages 85-86, the civil discovery privileges can be used, at best, only as rough analogies in determining the content of Exemption 5. Even if the existence of a particular privilege is undisputed, its assertion in two different cases with respect to the same document may lead to disclosure of the document in one case and withholding of it in the other case, depending upon such factors as the roles occupied by the private party and the agency in the two cases, and differing equities supporting disclosure and non-disclosure. The language of Exemption 5, therefore, is demonstrably neither plain nor unambiguous.

In addition, as was also recognized by Mr. Justice White in the portion of his opinion in *Mink*, cited above, and as was illustrated more dramatically perhaps by the legislative fate of this Court's attempt to compile a definitive list of privileges as part of its submission of proposed Federal Rules of Evidence to Congress, there is a marked lack of unanimity as to what the civil discovery privileges are.

Finally, as noted by this Court in *FOMC v. Merrill*, 443 U.S. 340, at page p. 355, Congress saw fit to incorporate a number of civil discovery privileges into exemptions *other* than Exemption 5.

In view of the foregoing, it cannot be said that Exemption 5 plainly and unambiguously incorporates all civil discovery

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[1]Mills' response to subdivision "A", Petitioner's Brief, pages 14-24.

privileges (or even that it incorporates all such privileges which are not found in the other exemptions), unless Petitioner means to say that Congress intended Exemption 5 be a blanket abdication of legislative power to the judiciary.

In short, Petitioner's argument that Exemption 5 plainly and unambiguously incorporates all discovery privileges, is tantamount to saying that Congress intended Exemption 5 to mean whatever the courts from time to time might say it means. This Court never has, and we feel confident, never will, adopt the construction of Exemption 5 urged by Petitioner.

The only alternative to such a construction, is to proceed as this Court did proceed, first in *Mink, supra*, and later, in more detail, in *FOMC v. Merrill, supra*; that is, to make, in each instance, a careful analysis of the legislative history to ascertain whether the claimed privilege was "specifically contemplated" by Congress (to use this Court's exact phraseology in *Merrill*), or "explicitly recognized" by Congress (to use the substantially identical phraseology of the Court below).

Contrary to Petitioner's assertions, the *Merrill* analysis clearly does *not* involve some sort of nebulous flexible approach, which Petitioner has never defined or explained beyond saying that it involves drawing "inferences" and "analogies".

Given the overriding policy of the Freedom of Information Act that information *must* be disclosed unless it falls within one of the specific exemptions in the Act (which, under settled principles, are to be narrowly construed), it follows that if the legislative history contains no clear and reliable indication that Congress intended to incorporate a given privilege into Exemption 5, and if, as here, the claimed privilege is not within any of the other exemptions, the

claimed privilege does not exist.

Correctly applying *FOMC v. Merrill, supra*, the Court below found the claimed privilege does not exist.

B. Congress Did Not Specifically Contemplate That Exemption 5 of the Act Would Serve to Exempt the Material at Issue Here From Disclosure Because of the Asserted Promises of Confidentially.[2]

In its Argument, Petitioner impliedly concedes the analysis employed by this Court in *Merrill, supra*, was correctly described in the opinion of the Court below and has been correctly described by Respondents. Thus, Subdivision B of Petitioner's Argument seems to abandon the position taken in subdivision "A" of its brief, discussed above.

Under subdivision "B" of Petitioner's Argument, the real and fundamental issue before the Court seems to be whether statements in behalf of the Departments of Defense and Justice, constitute "legislative history."[3]

At least, the Defense and Justice Departments' advocacy of the privilege at the Committee hearings shows a clear understanding that enactment of the Freedom of Information Act would abolish the privilege *unless* it were incorporated in Exemption 5.

In order to transform the statements submitted by the Departments of Defense and Justice into evidence of the intent of Congress, *i.e., legislative history*, Petitioner relies exclusively upon a passing remark in the Senate Commit-

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[2]Mills' response to subdivision "B", Petitioner's Brief, pages 25-36.

[3]Petitioner urges the intent of Congress is expressed in the statements of others. The statements referred to advocated the adoption of the privilege claimed here. The statements were made in hearings before a Senate committee studying proposed legislation, including among other matters, proposed wording for Exemption 5.

tee's report to the effect that the final wording of Exemption 5 "reflects suggestions made to the Committee in the course of the hearings."

Petitioner has failed to come forward with anything in any Committee report, the Congressional Record, or any other source, indicating that any Congressional Committee, or, in fact, any member of the House or Senate, ever *specifically contemplated* that Exemption 5 was to include the privilege claimed in the instant case.

Measured against *FOMC v. Merrill, supra*, Petitioner's reliance upon the Senate Report's statement that the final wording of Exemption 5 "reflects suggestions made to the Committee in the course of the hearings", falls far short of the mark. It fails to show any *specific* contemplation by the Committee of *anything*.

In *EPA v. Mink, supra* (410 U.S., at 89-91), on the other hand, this Court found that the suggestions which led to the final wording of Exemption 5 were suggestions pointing out that, under the wording originally proposed, it would have been necessary to disclose *in toto* a document consisting partly of *factual* statements (which Congress clearly intended to be disclosed) and partly of an attorney's work product or other deliberative materials (which Congress intended to be privileged).

Finally, as was cogently observed by Mr. Justice Stevens in dissent in *FOMC v. Merrill, supra*, if every statement or suggestion made to a Congressional Committee by interested parties were deemed evidence of the intent of Congress, the Freedom of Information Act (and, we might add, many other important acts) would soon be reduced to a shambles.

Petitioner has wholly failed to show Congress "specifically contemplated" Exemption 5 was to contain any such privilege as that claimed in the instant case, and the Court below correctly so held.

C. The Exercise in Judicial Legislation Urged by Petitioner Should Not Be Indulged, Leaving for the Congress the Responsibility of Providing Such Remedial Legislation as the Air Force May Demonstrate It Needs.

Petitioner is asking this Court to indulge in judicial legislation in a matter which is already under consideration by the Senate. We urge the Court refrain and leave to the Congress further resolution of the need for remedial legislation, if any.

As heretofore observed, there is no evidence whatsoever in the legislative history that Congress intended to include within the scope of Exemption 5, the privilege claimed here by Petitioner. In fact, there are substantial indications that Congress did not intend to adopt any such privilege.

First, the phraseology of the Act's nine exemptions would indicate that, whenever Congress intended to include a privilege for confidential statements, it did so by express language.

Second, significance must be given to Congress' overruling of this Court's decision in *FAA v. Robertson*, 422 U.S. 255. There Congress forcefully demonstrated its unwillingness to permit a privilege like the one claimed here to be founded upon the broad and general language formerly contained in Exemption 3 of the Act. It must, we submit, be reasonably concluded that Congress did not intend any such privilege to exist unless it were supported by clear legislative authority.

Third, the legislative history of Article V (Privileges) of the Federal Rules of Evidence,[4] shows the existence of strong disagreement among the members of Congress as to what

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[4]See, S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974).

the discovery privileges are, including those privileges concerning governmental secrets and official information. There is no reason to suppose that greater unanimity on this subject existed among the members of Congress when they enacted Exemption 5, than that which existed when they were unable to agree upon the enumeration of privileges submitted to them by this Court in its proposed Federal Rules of Evidence.

Furthermore, the questions raised by Petitioner's claim of privilege are sensitive policy questions with which the Congress, rather than the judiciary, should deal.

The privilege claimed by Petitioner, if it exists, would make it possible for the Air Force (and even a select group within the Air Force) to keep from the public and from the public's elected representatives in Government, a vast amount of factual information bearing directly upon such matters of vital public concern as the fitness of the Air Force to carry out its missions, and to manage and expend prudently the great sums of money with which the public has entrusted it.[5] The recognition of such a broad privilege, insulating the Air Force to a substantial degree from oversight by the public and by other branches of Government, would be unacceptable as it engenders and encourages military elitism.

Moreover, Petitioner's efforts to demonstrate the need for such a privilege rest basically upon the *a priori* assertions of those who advocate the privilege.

In this connection, it can be observed, *first*, that although such a privilege may make an individual more willing to talk, it does not necessarily assure the truthfulness of what he says.

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[5]These are subjects that are at the very heart of this case, involving as it does evidence of *Air Force Personnel Error*, failure of training procedures, and adequacy of training, materiel and procedures.

Given a privilege of confidentiality, a candid person may be encouraged to be more candid, but more importantly, a liar may be encouraged to embellish his lies.

Second, Petitioner has given no reason, and Respondent is aware of none, why persons engaged in military aviation should be particularly in need of such a privilege. Apparently, Congress has never considered that persons engaged in civil aviation need such a privilege, nor is there any general belief, in or out of Congress, that persons engaged in other activities that may involve serious accidents or catastrophes, need such a privilege. Surely it cannot be suggested that persons engaged in military aviation tend to be less ingenuous than persons in other walks of life.

Since no reason has been shown why those concerned with military aviation have a particular need for such a privilege, it would seem necessary to conclude in future cases, if Exemption 5 is held to include the privilege claimed in the instant case, that Exemption 5 would also authorize the suppression of *purely factual* statements given by witnesses, for example, in (*i*) "confidential" investigations by the National Transportation Safety Board of accidents involving vehicles sold in interstate commerce or, in civil aircraft accident investigation; (*ii*) "confidential" investigations by the Nuclear Regulatory Commission of episodes such as "Three Mile Island"; (*iii*) "confidential" investigations by the Food and Drug Administration of catastrophic events such as those caused by thalidomide; (*iv*) "confidential" investigations by the Environmental Protection Agency of such things as "Times Beach"; (*v*) "confidential" investigations by the Department of Health and Human Services of misadventures like the "swine" flu vaccination program; and (*vi*) "confidential" investigations by the Department of Agriculture of incidents of tainted meat in school lunch programs.

These and innumerable other privileges for the suppression of *purely factual* information not covered by any of the Act's eight other exemptions, would be the logically inevitable result of Petitioner's contention that this Court's decision in *FOMC v. Merrill, supra*, permits the courts to find such privileges in Exemption 5 by some sort of loose resort to "inference" and "analogy".

We are constrained to ask:

> Would this proliferation of privileges be consistent with the intent of Congress?

In the record now before this Court, Petitioner has placed two affidavits, one from the Commanding General of the Air Force Inspection and Safety Center, and the other from the Judge Advocate General of the Air Force, each of which states unequivocally that the privilege claimed here and premised upon promises of confidentiality that spring from Air Force Regulations is necessary because Air Force investigators lack subpoena power. If these statements are true, and Petitioner can hardly challenge their truth, Congress could readily supply the missing subpoena power, and might well find that alternative to be more consistent with the public interest than to enact into legislation the privilege which Petitioner, in effect, is asking this Court to "enact".[6]

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[6]There is a more fundamental shortcoming in Petitioner's argument, however. The Air Force Regulations relied upon do not have the force and effect of law. Quite apart from the fact that AFR 127-4 (Pet. App.) is of post-accident vintage, and is instructive as to what Petitioner means today, it is probably not a substantive rule. While that alone may not be controlling on whether the Regulations are to be given the force and effect of law it is nevertheless an important consideration in determining that threshold issue.

See generally, *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705 (1979). As stated by Justice Rehnquist, in the *Brown* case,

> "[t]he central distinction among agency regulations found in the Administrative Procedure Act (APA) is that between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice'

(footnote continued on following page)

Finally, in April of this year, Petitioner asked Congress to enact into law the privilege which Petitioner is claiming in this case. So far, Congress has not acted, and the matter is now before the Senate, which has asked the Department of Defense to supply it with further information.[7]

In the circumstances, we submit that Petitioner's effort to persuade this Court to adopt the privilege in question, is

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on the other. [5 USC §553 (b), (d) (1976)]. A 'substantive rule' is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference. [Footnote omitted]. But in *Morton v. Ruiz*, 415 US 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), we noted a characteristic inherent in the concept of a 'substantive rule.' We described a substantive rule — or a 'legislative-type rule,' *id.*, at 236, 94 S.Ct., at 1074 — as one 'affecting individual rights and obligations,' *Id.*, at 232, 94 S.Ct., at 1073. This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.' *Id.*, at 235, 236, 94 S.Ct., at 1074.

That an agency regulation is 'substantive,' however, does not by itself give it the 'force and effect of law.' . . . As this Court noted in *Batterton v. Francis*, 432 US 416, 426 n. 9, 97 S.Ct. 2399, 2405 n. 9, 53 L.Ed.2d 448 (1977):

'Legislative, or substantive, regulations are "issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. . . . Such rules have the force and effect of law." '

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. *Morton v. Ruis*, 415 US at 199, 232, 94 S.Ct., at 1073 (1974). For agency discretion is not only limited by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.' *NLRB v. Wyman-Gordon Co.*, 394 US 759, 764, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969). The pertinent procedural limitations in this case are those found in the APA."

The Air Force Regulations here are only "housekeeping" or "policy" rules of agency operation, and cannot therefore be fairly relied upon as authority having the "force and effect of law."

[7]See, S. Conf. Rep. No. 98-213, 98th Cong., 1st Sess. 264 (1983). This most recent legislative request casts further doubt upon the Government's assertion that there is presently a viable statutory basis for the claimed privilege in the language of Exemption 5 (Pages 30-33, this brief).

clearly an effort to persuade the judiciary to engage in legislative functions which should be neither countenanced nor indulged.

ARGUMENT.

A. Unfortunately, the Language of Exemption 5 Has No Plain and Unambiguous Meaning. It Must Be Construed to Include Only Those Privileges for Which There Is Clear and Reliable Support in the Legislative History.

Petitioner is, we submit, incorrect in its contention that the language of Exemption 5 is plain and unambiguous. This was clearly pointed out by Mr. Justice White, writing for the Court in *EPA v. Mink*, 410 U.S. 73, at pages 85-86, as follows:

> "This language [Exemption 5] clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. *Drawing such a line between what may be withheld and what must be disclosed is not without difficulties. In many important respects, the rules governing discovery in such litigation have remained uncertain from the very beginnings of the republic.* Moreover, at best, the discovery rules can only be applied under Exemption 5 *by way of rough analogies*. For example, we do not know whether the government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant. Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." (Emphasis added.)

Mr. Justice White, then, pointed out two major sources of ambiguity in the language of Exemption 5. The first arises even in a case in which the existence of a given privilege is conceded. Notwithstanding the existence of a given privilege, its assertion in two different cases with respect to the same document may lead to disclosure of the document in

one case and withholding of it in the other case, depending upon such factors as the roles occupied by the private party and the agency in the two cases, and differing equities in the two cases supporting disclosure and non-disclosure.

That being the case there is a substantial element of ambiguity in the test prescribed by Exemption 5; namely, that the document "not be available by law to a party other than an agency in litigation with the agency". Given the same document and the same privilege, the most that can be said is that in some cases, the document would be available to the private party, and in other cases, it would not be available to him, depending solely upon factors which are completely extraneous to the Freedom of Information Act.

The second important ambiguity noted by Mr. Justice White is described in the hereinabove quoted passage that reads:

> "In many important respects, the rules governing discovery in such litigation *have remained uncertain from the very beginnings of the republic*." (Emphasis added.)

The validity of Mr. Justice White's observation was dramatically illustrated and underscored by the legislative fate of this Court's attempt to compile a definitive list of privileges in Article V (Privileges) of the proposed Federal Rules of Evidence. The Congressional treatment accorded that list of privileges is described in S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974) (reprinted in U.S. Code Cong. and Admin. News, 93d Cong., 2d Sess. (1974), Vol. 4, at pp. 7052-7053), as follows:

> "*Note on Privilege*"
>
> "Clearly, the most far-reaching House change in the rules as promulgated, was the elimination of the Court's proposed rules on privilege contained in Article V. Article V purported to define the privileges to be recognized in the federal courts in all actions, cases, and

> proceedings; any alleged privilege not enumerated in Article V (e.g., that of a news reporter) was deemed not to exist and could not be given effect unless of constitutional dimension. The privileges recognized included trade secrets, lawyer-client, husband-wife, doctor-patient (but applicable only to psychotherapists), identity of informer, secrets of state, and official information.
>
> From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges with the nub of the disagreement being whether the rule defining them was merely codifying existing law. * * * *
>
> Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated and a single rule (Rule 501) substituted, leaving the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law. * * * *"

Thus, as finally adopted, Article V (Privileges) consists of a single general rule, Rule 501, which reads in pertinent part, as follows:

> "Except as otherwise required by the Constitution of the United States or provided by act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . ."

Finally, as noted by this Court in *FOMC v. Merrill*, 443 U.S. 340, at 355:

> "Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5 and dealt with other civil discovery privileges in Exemptions other than Exemption 5, a claim that a privilege other than executive privilege, or the attorney privilege, is covered by Exemption 5 must be viewed with caution."

In view of the foregoing, it cannot be fairly said that Exemption 5 plainly and unambiguously incorporates *all* civil discovery privileges (or even that it incorporates all such privileges which are not found in the other exemptions), unless Petitioner means to have the Court conclude Congress intended Exemption 5 to be a blanket abdication of legislative power to the judiciary.

In short, Petitioner's argument[8] that Exemption 5 plainly and unambiguously incorporates all discovery privileges, is tantamount to saying that Congress intended Exemption 5 to mean whatever the Courts from time to time might say it means. Petitioner asks the Court conclude that Exemption 5 is to have the same meaning as Rule 501 of the Federal Rules of Evidence, as applied to questions of admissibility, from time to time, in litigation between a government agency and a party other than an agency.

While such a broad grant of discretion to the judiciary is not inappropriate in the Federal Rules of Evidence, we submit that, as applied to the Freedom of Information Act, it amounts to a grant of legislative power to the judiciary which Congress never intended. And, we submit this Court did not so rule in *Merrill, supra*.

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[8]Petitioner's Brief, pages 14-24.

The only alternative to that construction is to proceed as this Court did in *Mink*, and later with greater specificity in *Merrill*. In both cases, a careful analysis was made of the legislative history to ascertain whether the claimed privilege was "specifically contemplated" by Congress (to use this Court's precise phraseology in *Merrill*), or "explicitly recognized" by Congress (to use the substantially identical phraseology of the Court below).[9]

Petitioner persists, however, in its contention that the analysis made by this Court in *Merrill* involved some sort of nebulous flexible approach, which is not defined or explained beyond saying that it involved drawing "inferences" and "analogies".

In our brief in opposition to the Petition for Certiorari, we pointed out the Court in *Merrill* did no such thing. Rather, the decision in *Merrill* was clearly based upon a careful search of the legislative history of Exemption 5. The search revealed such clear and specific evidences of the intent of Congress that the inferences and analogies recognized by the Court were logically inescapable. Indeed, we believe the Court found an analogy so compelling it left no doubt as to the intent of Congress.[10]

Given the overriding policy of the Freedom of Information Act that information *must* be disclosed unless it falls within one of the specific exemptions in the Act (which under settled principles are to be narrowly construed), it follows that if the legislative history contains no clear and reliable indication that Congress intended to incorporate a

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[9]We note it is significant that Petitioner has now apparently abandoned the semantic quibble as to the alleged difference between the meaning of "specifically contemplated" and "explicitly recognized", advanced in its Petition for Certiorari. See, Petition, page 13, and Brief of Respondent Mills in Opposition, pages 6-7.

[10]See, 443 U.S. 340, *supra*, at 352, and, the discussion at 361-362.

given privilege into Exemption 5, and if, as in the instant case, the claimed privilege is not within any of the other exemptions, the claimed privilege does not exist.

Petitioner has wholly failed to point to any clear indications that Congress, in Exemption 5, intended to adopt the privilege which Petitioner is claiming here and we submit that there are no such indications in the legislative history. We believe the Court below correctly so held, and therefore correctly held the material sought here is not covered by any privilege and is not exempt from disclosure.

B. The Court Below Correctly Applied This Court's Decision in Merrill. Congress Did Not Intend to Adopt the Privilege Claimed by the Air Force.

Petitioner seems to agree this Court in *Merrill* made a careful search of the legislative history to ascertain whether a particular claimed privilege had been specifically contemplated by Congress.[11] This comports with our understanding, and the understanding of the Court below, as to what *Merrill* stands for, and it seems therefore to be an abandonment of the contentions made by Petitioner both in subdivision "A" of its Argument (and also in its Petition), to the effect that this Court's approach in *Merrill* was some sort of undefined "flexible" approach based on inference and analogy.

In any event, in subdivision "B" of its Argument, Petitioner contends that it has found evidence in *the legislative history* of Exemption 5, that Congress *intended* to adopt the privilege claimed by Petitioner here.

Petitioner suggests the evidence of that legislative history is in statements made in behalf of the Departments of Defense and Justice that advocate adoption of that privilege during hearings before a Senate committee studying pro-

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[11]Subdivision "B" of its Argument, Petitioner's Brief, pages 25-36.

posed wording for Exemption 5. We now proceed to examine that position.

Whatever else can be said of these statements as "legislative history", they at least show the Defense and Justice Departments clearly understood that enactment of the Freedom of Information Act would abolish the claimed privilege unless it were incorporated into Exemption 5, or, some other exemption.

In order to transform these statements into evidence of the intent of Congress, Petitioner relies exclusively upon a passing remark in the Senate committee's report to the effect that the final wording of Exemption 5 "reflects suggestions made to the Committee in the course of the hearings".[12]

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[12]The argument appears in Petitioner's Brief at page 26. The quoted material appears in S. Rep. No. 813, 89th Cong., 1st Sess. 4 (1965). At that juncture the report only recapitulates the history of the legislation. Specific comments on the amendments are made elsewhere in the report. The discussion of Exemption 5 appears at 9, as follows:

> "Exemption No. 5 relates to 'inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency.' It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted to *delimit the exception* as narrowly as consistent with efficient Government operation."

Furthermore, the suggestions offered by the Departments of Defense and Justice, that the legislation should include a privilege of confidentiality for witness statements in aircraft accident investigations was addressed to Exemption 7 of the Act (dealing with law enforcement investigations), rather than Exemption 5. *Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., on S. 1160, and other bills (May 12, 13, 14 and 21, 1965)* ("1965 Senate Hearings"), *at pages 206, 417-418; Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 1st Sess., on H. R. 5012, and other bills (March 30, 31, April 1, 2, and 5, 1965)* ("1965 House Hearings"), *at page 220.* Even a casual reading of Exemption 7 and its related legislative history shows conclusively that there is nothing in Exemption 7 which remotely reflects the adoption of these suggestions. *S. Rep. 813, 89th Cong., 1st Sess. (1965), at p. 9; H.R. Rep. No. 1497, 89th Cong., 1st Sess. (1966), as reprinted in U.S. Code Cong. and Adm. News, at page 2428.* Petitioner has never contended otherwise.

Petitioner has utterly failed to cite anything in any Committee Report, the Congressional Record, or any other source, indicating *any Congressional committee*, or, in fact, *any member of the House or Senate*, ever specifically contemplated that Exemption 5 was to include the privilege here claimed by Petitioner. Petitioner has therefore wholly failed to meet the test established in *Merrill*.

Measured against *Merrill*, Petitioner's exclusive reliance upon the Senate Report's statement that the final wording of Exemption 5 "reflects *suggestions made to the Committee* in the course of the hearings", falls far short of the mark. That statement fails to show any specific contemplation by the Committee or a member of the Congress of anything specific.

In *EPA v. Mink, supra* (410 U.S., at pp. 89-91), this Court found the suggestions which led to the final wording of Exemption 5, were suggestions pointing out that, under the wording originally proposed for that Exemption, it would have been necessary to disclose *in toto*, a document consisting partly of *factual* statements (which Congress clearly intended to be disclosed) and partly of an attorney's work product or other deliberative materials (which Congress intended to be privileged).

In this connection, the Court, at 410 U.S. 89-91, said:

> "When the bill that ultimately became the Freedom of Information Act, § 1160, was introduced in the 89th Congress, it contained an exemption that excluded:
>
> > 'Inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy.'
>
> This formulation was designed to permit [a]ll factual material in government records . . . to be made available to the public. S. Rep. 1219, 88th Cong. 2d Sess., 7 (1964). [Emphasis as in Court's opinion.] The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an

otherwise private document simply because the document did not deal 'solely' with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably under the proposed exemption, become available to the public.[18] As a result of this criticism, Exemption 5 was changed to substantially its present form."

In Note 18 to the foregoing text, the Court gave the following examples of the statements made to the Committee (which in fact, were responsible for the final language of Exemption 5):

"Examples of these many statements are:

Federal Aviation Administration (1965 Senate Hearings, p. 446):

'Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within an agency of the executive branch would not be protected by the proposed exemptions.'

Department of Commerce (1965 Senate Hearings, p. 406):

'Under this provision, internal memorandums dealing with *mixed questions of fact, law, and policy*, could well become public information.' (Emphasis in original.)"

The foregoing passage from this Court's opinion in *Mink, supra*, and the quoted portion of Note 18 show clearly the "suggestions made to the Committee in the course of the hearings", which were reflected in the final wording of Exemption 5, were entirely different from the statements submitted by the Department of Defense and the Department of Justice. But, the so-called "evidence" of the intent of Congress to adopt the privilege claimed here consists of the Department of Defense and Justice Department statements tied to the casual reference in the Senate Committee report

that the final language "reflects suggestions made to the Committee in the course of the hearings". It is also significant that Note 16 on page 17 of Petitioner's Brief, is grossly in error when it attributes to the Court below the explanation of the final wording of Exemption 5 given by this Court in the above-quoted passage from *Mink*, and refers to that explanation as "unconvincing".

In the course of his dissenting opinion in *FOMC v. Merrill, supra*, at 443 U.S. 366, n.2, Mr. Justice Stevens offered the following cautionary remarks concerning review of the legislative history to ascertain the content of Exemption 5:

> "The court admirably recognizes the danger of allowing every conceivable discovery privilege to be read into Exemption 5. See ante, at 354-355. it proposes, therefore, that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the exemption. To the extent, however, that *every* reference in the subcommittee hearings to the danger of disclosing of some type of governmental information suffices under this test — virtually every agency appeared before Congress with a list of such 'dangers' — the exemption would render the Act meaningless." (Emphasis in original text.)

In *Merrill*, the Court's analysis fully satisfied those cautionary remarks, because the Court found very clear evidence in the legislative history that Congress had intended to adopt a limited privilege for internally generated information of a commercial nature, which, if disclosed prematurely, might frustrate the Government's ability to achieve legitimate ends which it wished to achieve through the execution and performance of contractual arrangements. The Court alluded to the "buy" and "sell" orders for government securities involved in that case and *in addition* found evidence in the records of the pertinent committee hearings

that various agencies had requested such a privilege.

By contrast, Petitioner has here been able to point only to evidence of requests, and has utterly failed to point to any evidence that Congress *specifically contemplated* the requests were to be included in Exemption 5. In the instant case, therefore, the cautionary remarks of Mr. Justice Stevens are singularly apposite.

In short, Petitioner has wholly failed to show that Congress specifically contemplated Exemption 5 was to contain any such privilege and the Court below correctly so held.

C. Petitioner Is Asking the Court to Legislate in an Area Where the Congress Has Refused. And, Only Legislation Is Appropriate.

The overall thrust of Petitioner's Argument asks this Court to indulge in judicial legislation in a matter which is presently under consideration by appropriate committees of the House and Senate. We urge the Court to refuse and affirm the Court below. There are substantial indications that Congress did not intend to adopt the privilege claimed here.

First, the phraseology of the nine exemptions to the Act indicates that, whenever Congress intended to include a privilege for confidential statements, it did so by express language. For example, in Exemption 4, Congress explicitly created a privilege for trade secrets and other confidential commercial and financial information submitted to the Government by persons outside government. In Exemption 7, Congress specifically recognized an exemption for "confidential information furnished only by [a] confidential source in the course of a criminal investigation or a lawful national security intelligence investigation". In addition, the scope of Exemption 1 would clearly accord privileged status to confidential information pertaining to the national defense or foreign policy which was authorized under criteria es-

tablished by an Executive order to be kept secret, and which had been classified pursuant to Executive order. Likewise, in Exemption 3, *Congress reserved to itself* the right to authorize further privileges for confidential information by statute leaving no discretion on the issue of disclosure, or establishing particular criteria for withholding information, or referring to particular types of matters to be withheld.

It is clear therefore that if Congress had intended to adopt an additional privilege of confidentiality, such as Petitioner is claiming, applicable to information which does not come within any of the privileges mentioned above, Congress would have used express language to create that privilege.

Second, we believe the legislative fate of this Court's decision in *FAA v. Robertson*, 422 U.S. 255, bears upon the legislative intent. In *Robertson*, this Court found a privilege for statements given by airline company personnel to the Federal Aviation Administrator. There, civilian aviation safety was the subject matter addressed. The rationale by which the Administrator and this Court justified the privilege was substantially the same as the rationale advanced by Petitioner in the instant case in support of its claimed privilege for statements pertaining to military aviation safety. See, 422 U.S. at pages 266, 267. The particular Freedom of Information Act Exemption relied upon in that case, however, was Exemption 3, *as it was then written and not Exemption 5*. At that time, the wording of Exemption 3 simply authorized withholding of information pursuant to a statute, and did not contain the requirements of Exemption 3 as it is presently written, *i.e.*, that the statute leave no discretion on the issue of withholding information, or that the statute establish particular criteria for withholding information, or refer to particular types of information to be withheld.

The *Congressional response* to that decision was to rewrite Exemption 3 in the form in which it *now* exists. The legislative history explaining the Amendment states the intent of Congress was to overrule *Federal Aviation Administration v. Robertson, supra*, 1976 U.S. Code Cong. and Adm. News, pages 2260-2261.

We submit, the foregoing history of *FAA v. Robertson, supra*, shows clearly the unwillingness of Congress to permit a privilege like the one claimed here to be based upon broad and general language such as that formerly contained in Exemption 3, and presently contained in Exemption 5. The only logical conclusion to be drawn is that Congress did not intend any such privilege to exist.

Third, the legislative history of Article V (Privileges) of the Federal Rules of Evidence, to which we have already referred, shows the existence of strong disagreement between the members of Congress as to what the discovery privileges are, including those privileges concerning governmental secrets and official information. The lack of Congressional unanimity on that subject is clearly shown by the following passage from the legislative history on the Federal Rules of Evidence, quoted at greater length on pages 15-16 of this brief, *supra*:

> "From the outset, it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges, with the nub of the disagreement being whether the rules defining them was merely codifying existing law." (S. Rep. No. 93-1277, 93d Cong., 1st Sess. (19...), U.S. Code Cong. and Adm. News, 93d Cong., 2d Sess., 1974, Vol. 4, at pp. 7052-7053.)

Petitioner has not come forward with any reason to suppose, and we are aware of none, that greater unanimity on

this subject existed among the members of Congress when they enacted Exemption 5, than that which existed among them when they were unable to agree upon the enumeration of privileges submitted to them by this Court in its proposed Federal Rules of Evidence.

From all of the foregoing, we believe the following conclusions must be drawn:

(1) *First*, there is no evidence in the legislative history that Congress ever *specifically contemplated* the adoption of the privilege which Petitioner is asking this Court to recognize;

(2) *Second*, if Congress had specifically contemplated the adoption of that privilege, it would have used explicit language to that effect, as it did in other instances when it intended to recognize a privilege for confidential statements;

(3) *Third*, the available evidence indicates Congress is opposed to claims of privilege for confidential statements based upon broad and general statutory language, such as that of Exemption 5, and did not intend such privileges to exist unless they were supported by clear legislative authority; and

(4) *Finally*, there is no reason to suppose that there was ever sufficient agreement among the members of the Congress favoring recognition of the privilege which Petitioner wishes this Court to recognize, and, in fact, the available evidence indicates a substantial lack of unanimity among the members of the Congress on that subject.

In view of the foregoing, we believe the arguments advanced by Petitioner in this case must be regarded as a bold effort to induce this Court to indulge in judicial legislation.

Furthermore, the questions raised by Petitioner's claim of privilege are sensitive policy questions with which the

Congress, rather than the judiciary, should deal.[13]

We submit the recognition of such a broad privilege, insulating the Air Force to such a substantial degree from Congressional oversight was certainly never intended by the Congress.

Moreover, we would note that Petitioner's efforts to demonstrate the need for such a privilege rest basically upon the *a priori* assertions of those who advocate the privilege. To do so may encourage disclosure and when given a privilege of confidentiality although a candid person may be encouraged to be more candid, it is equally likely that a liar may be encouraged to embellish his lies to suit his private purposes.

Furthermore Petitioner has given no reason, and we are aware of none, why persons engaged in military aviation safety should be regarded differently than others who are similarly involved.

Given the breadth and complexity of governmental activities, there are many agencies which are officially concerned with safety in some important way. An important part of their official functions is to conduct investigations

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[13]In this connection, we believe it is most important to realize that the privilege claimed by Petitioner would make it possible for a select group within the Air Force to keep from the public and from the Congress a vast amount of *purely factual* information (not subject to Exemptions 1 through 4, or Exemptions 6 through 9 of the Act), bearing directly upon such matters of vital public concern as the fitness of the Air Force to carry out its missions, and to manage and expend prudently the great sums of money with which the public has entrusted it.

In this connection too, the wording of the "WITNESS STATEMENT FOREMAT", appearing on page 8a of the Appendix to Petitioner's Brief, and the wording of Paragraph 19a.(1), of Air Force Regulation 127-4 (January 1, 1973), appearing in Appendix E, page 31a, of the Petition for Certiorari, show explicitly that the claimed privilege, if it exists, is a privilege to keep information "only within the USAF", and to give binding assurance to those furnishing information that the information they furnish "will not be disseminated outside the US Air Force . . . ."

of serious accidents and, indeed, major catastrophes, with a view to preventing recurrence. Witnesses would be unwilling to talk frankly with those investigators too for fear of incurring personal liability, adverse publicity, reprisals from fellow workers or superiors, or other adverse consequences.

Surely it cannot be suggested that persons engaged in military aviation tend to be less ingenuous than persons in other walks of life. No reason appears, therefore, why the numerous other governmental agencies which are importantly concerned with safety investigations, could not seek to make a plausible claim of need for a privilege of confidentiality like that put forth by the Air Force. It is noteworthy, however, that Congress has never considered that there is a need for such a privilege among those numerous other governmental agencies.

If Exemption 5 is held to include the privilege claimed here, then it would also authorize the suppression elsewhere of *purely factual* statements given by witnesses, for example, in "confidential" investigations: (*i*) by the National Transportation Safety Board of accidents involving vehicles sold in interstate commerce; (*ii*) by the Nuclear Regulatory Commission of episodes such as "Three Mile Island"; (*iii*) by the Food and Drug Administration of catastrophic events such as those caused by thalidomide; (*iv*) by the Environmental Protection Agency of such things as "Times Beach" and "Love Canal"; (*v*) by the Department of Health and Human Services of misadventures like the "swine" flu vaccination program; and (*vi*) by the Department of Agriculture of incidents of tainted meat in school lunch programs. Thus, there is no apparent reason why the Air Force's *a priori* justifications for its alleged privilege would not be equally persuasive as applied to any of the foregoing "privileges."

These and innumerable other privileges for the suppression of information (not covered by any of the Act's eight other exemptions), would be the logically inevitable result should this Court reverse the Court below.

Petitioner's suggestion that *Merrill* permits some loose resort to "inference" and "analogy," and that the "inferences" and "analogies" can be based upon something as flimsy as the passing remark in the Senate Committee Report that the final wording of Exemption 5, "Reflects suggestions made to the Committee in the course of the hearings," would cause a proliferation of privileges clearly inapposite with the intent of Congress.

D. The Congress Is Presently Considering Remedial Legislation.

In the record now before this Court, Petitioner has placed two affidavits, one from the Commanding General of the Air Force Inspection and Safety Center, and the other from the Judge Advocate General of the Air Force, each of which states unequivocally that the privilege claimed in the instant case is necessary because Air Force investigators lack subpoena power. In this connection, the Affidavit submitted by the Commanding General of the Air Force Inspection and Safety Center (Jt. App. 37, at p. 39) states as follows:

> "Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside the Air Force. *Lacking authority to subpoena witnesses*, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident." (Emphasis added.)

To the same effect, the affidavit submitted by the Judge Advocate General of the Air Force (Jt. App. 41, at p. 43)

states as follows:

> "The investigating officers and boards *have no subpoena powers to compel testimony and, therefore,* promise witnesses that their testimony will be used solely for the purpose of flight safety and that it will not be released to persons outside of the Air Force." (Emphasis added.)

If these statements are true, and Petitioner can hardly challenge their truth, Congress could readily supply the missing subpoena power. We submit that Congress well might find the alternative of subpoena power to be more consistent with the public interests than to permit the Air Force to have a privilege of confidentiality, which, as noted earlier in this brief, and as explicitly asserted in the portions of the Affidavits of the two senior Air Force officers quoted above, is claimed to give the Air Force a right not only to conceal vitally important *factual* information from the public, but also to conceal it from all branches and agencies of the Government "outside of the Air Force".

The very matter which Petitioner is asking this Court to decide, is now before the House and Senate Armed Services Committees for consideration. During the Administration of President Carter, the Department of Defense requested legislation for the purpose of enacting into law the privilege claimed by Petitioner in this case. The proposed legislation was the subject of a hearing on February 7, 1980, before the Procurement and Nuclear Systems Subcommittee of the House Committee on Armed Services. (Hearing on *H.R. 6362 [H.R. 7552], H.A.S.C. No. 96-43.*) At that hearing, Lieutenant General Howard M. Lane, Inspector General of the Air Force, was the spokesman for the Defense Department and the Carter Administration. (*Id.*, at p. 3.)

The proposed legislation was never enacted, although the House Armed Services Committee reported favorably on it,

after having received assurances from General Lane that the legislation, if enacted, would not totally exclude the Congress from access to confidential statements and other data included in aircraft safety investigations. (House Armed Services Committee No. 96-43 (1980), at pp. 25 and 29.) In this connection, the proposed legislation would have differed significantly from the privilege asserted by Petitioner in the instant case, in that, as we have already noted, the privilege which Petitioner is asserting before this Court would exclude the Congress and all other persons and agencies outside of the Air Force.

It is highly significant that, in connection with this 1980 legislative request and the report of the House Armed Services Committee thereon, both General Lane, as spokesman for the Department of Defense and the Administration, and the Committee, itself, were unequivocally of the view that *there was no existing statutory support whatever for the privilege of confidentiality*.

General Lane's statement to this effect, House Armed Services Committee No. 96-43 (1980), at page 27, is as follows:

> "There are statutory precedents which protect the reports of the NTSB relating to railroad and civil aircraft accidents from being admitted as evidence in any lawsuit for damages growing out of any matter mentioned in such reports. The protection for railroad accident reports is found at 45 U.S.C. 41 and for civil aircraft accident reports at 49 U.S.C. 1441(e). However, these statutes do not protect these reports from being released to the public. *There presently is no statutory protection of any kind for military aircraft accident safety reports*." (Emphasis added.)

The views of the Committee (proper "legislative history), concurring in the views expressed by General Lane, were

as follows (H. Rep. 96-1445, 96th Cong., 2d Sess. (1980), at pp. 3-4):

"*No present statutory protection for safety reports*

The confidential and privileged status of aircraft accident safety reports, and the promise of confidentiality to persons who give information to investigators, are crucial to the continued success of aircraft safety programs within the Armed Forces. *Yet, there is no existing statutory protection of any kind for military aircraft accident safety reports.* The limited use and confidential status of safety reports are protected only by the claim of executive privilege based on the constitutional principle of separation of powers. The claim of executive privilege has been used to protect safety reports from use in litigation against the government and government contractors and from requests under the Freedom of Information Act (5 U.S.C. 552). On the other hand, safety reports are withheld from military courts-martial and other disciplinary proceedings, administrative boards, armed forces legal representatives, and United States attorneys.

The claim of executive privilege has not been universally recognized by Federal courts; and in an increasingly litigious society, the committee agrees with the position of the Executive Branch that *the status of aircraft accident safety reports should not be supported by such a slender reed.* To do so merely invites litigation at public expense while eroding the effectiveness of flight safety programs. The bill, H.R. 7552, is designed to clarify the authority of the Armed Forces to conduct aircraft safety investigations. Enactment of the bill would leave no doubt that the intent of the Congress is to promote flight safety by confining the release or use of records or reports of safety investigations to safety purposes." (Emphasis added.)

It seems hardly necessary to point out the foregoing views are diametrically opposed to Petitioner's confident assertions that the privilege in question is clearly included within the "plain and unambiguous" language of Exemption 5, and is clearly evidenced by "legislative history" dating back to 1965.[14]

In response to an Executive Branch legislative request transmitted to Congress on April 27, 1983, a provision (Section 1009) was inserted in the Senate version (S. 675, 98th Cong., 1st Sess.) of the Department of Defense Authorization Act of 1984, which would have enacted into law the privilege claimed by Petitioner in this case. No such provision, however, was included in the companion House bill (H.R. 2969, 98th Cong., 1st Sess.).

This 1983 request was first considered by the Senate Armed Services Committee, which recommended its adoption for the reason that, "Enactment of this Committee recommendation will result in a clear statement by the Congress that the issue of the confidentiality of these portions of these reports should be removed from the arena in which *individual judicial assessments are made as to the validity of this policy.*" (emphasis added) (S. Rep. 98-174, 98th Cong., 1st Sess. (1983), at p. 249.) The Committee went on to observe that the proposed legislation, if enacted, would be effective as an exemptive statute under the provisions of Exemption 3 of the Freedom of Information Act. (*Id.* at pp. 249-250.)

Because the companion House bill did not include any such privilege, and because of other differences between the Senate and House bills, the matter went to conference. At conference, the Senate agreed to withdraw Section 1009,

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[14](See, *e.g.*, Petitioner's Brief, at pp. 26-28.)

and the privilege contained therein.

The reasons why the Senate receded on this point are set forth in the Senate Conference Report (S. Rep. No. 98-213, 98th Cong., 1st Sess. at p. 264) as follows:

> "Although the conferees generally agree that some legislation may be needed on this subject, the conferees believe that this matter requires further study. Therefore, the Senate recedes.
>
> To permit the required further study, *the Secretary of Defense is requested to furnish before January 15, 1984*, to the Committees on Armed Services of the Senate and House of Representatives, a report summarizing the existing practice in the military departments concerning release of information in aircraft accident safety investigation reports, the history of the development of that practice, a description of the types of information concerning aircraft accidents that are now and should continue to be releaseable to the public, and his views regarding the scope of the provisions in the Senate bill and whether those provisions would merely continue or expand existing regulatory restrictions on the release of the type of information in question." (emphasis added)

The foregoing circumstances clearly show that Petitioner is asking this Court not only to indulge in judicial legislation, but also to "legislate" in a matter now before the appropriate Committees of Congress for further study.

As was correctly observed in this connection by the Court below (Petition, App. A, at p. 18a; 688 F.2d 638, at p. 646):

> "Congress has given continued attention to the FOIA, amending it to conform to the legislative will; judicial amendments are both unnecessary and inappropriate."

Summary.

There is no evidence that Congress ever specifically contemplated Exemption 5 of the Freedom of Information Act should include a privilege which would justify withholding from Respondents the materials and information they seek in this case. In holding Respondents were entitled to those statements, the Court below correctly applied the decision of this Court in *FOMC v. Merrill, supra.*

The Court below correctly recognized Petitioner is attempting to persuade the judiciary to "legislate" into Exemption 5, a privilege which Congress neither enacted specifically nor intended impliedly. The very privilege which Petitioner would have this Court adopt is now before the appropriate Committees of Congress for further study and legislation, if appropriate.

Conclusion.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

LAWRENCE J. GALARDI,
DEAN F. COCHRAN,
Attorneys for Respondent,
Mills Manufacturing Corporation.